

**Carry Companies of Illinois, Inc. and Local 705,  
International Brotherhood of Teamsters, AFL-  
CIO.** Cases 13-CA-29715, 13-CA-29768, 13-  
CA-29910, 13-CA-30075, 13-CA-30219, and  
13-RC-18093

May 28, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On June 30, 1992, Administrative Law Judge Karl Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Charging Party filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's and Charging Party's exceptions. The Respondent also filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs<sup>1</sup> and has decided to affirm

<sup>1</sup> In its brief in support of exceptions, the Respondent argued, inter alia, that the judge, in finding certain violations of Sec. 8(a)(3), failed to properly cite and apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Having reviewed the judge's decision, we find that the judge's discussion properly set forth the General Counsel's prima facie case and the Respondent's burden to rebut it in the case of each of the alleged discriminatees. Accordingly, we find that the judge's decision "fully satisfies the analytical objectives of *Wright Line* and no purpose is served by recasting his findings to achieve formalistic compliance with the *Wright Line* analysis." *Family Foods*, 300 NLRB 649 fn. 3 (1990).

The Charging Party has excepted to the judge's finding that dispatchers are not supervisors within the meaning of the Act. It argues that this issue has never been litigated by the parties. We disagree. The Charging Party argued this issue in an earlier representation case, and its arguments were rejected on the merits. In this case it was afforded the opportunity to show that the dispatchers' status had changed, but the judge found that the evidence failed to show any change that would warrant a different finding on their status. Accordingly, we agree with the judge that the dispatchers are not supervisors within the meaning of the Act.

Member Devaney agrees that the judge reached the correct conclusion regarding the dispatchers' alleged supervisory status. See *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978).

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, in light of the judge's finding, which we affirm, that the Respondent violated Sec. 8(a)(1) of the Act on September 23, 1990, by engaging in surveillance of union representatives distributing leaflets to employees, we find it unnecessary to pass on the

the judge's rulings, findings,<sup>2</sup> and conclusions of law<sup>3</sup> only to the extent consistent with this Decision and Order.

The complaint alleged that the Respondent reduced the overtime and weekend work assignments given to its driver, Edward Peralta, in retaliation for Peralta's union activity, causing him to suffer a loss of income. Although the judge found that Peralta lost a significant amount of overtime pay, he concluded that the record did not establish that this reduction was attributable to Peralta's union activities and he dismissed the pertinent complaint allegations. The General Counsel and

second allegation of the Respondent's surveillance approximately 2 weeks later on October 7, 1990. This allegation is cumulative and does not change our remedy and Order.

We also find it unnecessary to pass on the judge's finding that the statements contained in the Respondent's March 29, 1991 letter constituted an unlawful threat of discharge or loss of employment. In light of our finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening discriminatees Peralta and Rosenberg with discharge or loss of employment, this alleged violation would be cumulative and would not change our remedy and Order.

Because we do not pass on the judge's finding that the Respondent's March 29, 1991 letter was unlawful, and because we affirm the judge's dismissal of the allegation that the Respondent's February 28, 1991 letter was unlawful, our colleague's description of both of these letters as "unlawful" represent simply his own position.

Member Devaney would reverse the judge's finding that the Respondent's unlawful February 28, 1991 letter was cured by the Respondent's second unlawful letter of March 29, 1991. He notes that while an employer may repudiate his unlawful conduct, such repudiation must also be timely and free from other proscribed illegal conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Member Devaney notes that the Respondent's letter of March 29 issued some 4 weeks after the Respondent's unlawful statements issued in the first letter. Most significant is that the Respondent's second letter contained language, as the judge found, that could be perceived as a veiled threat that employees could lose their jobs. Under these circumstances, Member Devaney would find that the March 29 letter was ineffective to repudiate the Respondent's unlawful statement contained in the February 28, 1991 letter.

In his decision, the judge inadvertently referred to two incidents of Herman Rosenberg's tardiness for work dated July 27 and October 30, 1991. We correct the judge's decision to reflect that these incidents occurred on those days in 1990.

<sup>3</sup> We do not affirm the judge's unsupported conclusion of law that the Respondent violated Sec. 8(a)(1) and (3) of the Act by suspending Herman Rosenberg and by issuing warnings to him for lateness on October 30 and December 28, 1990. The complaint alleged, inter alia, that the Respondent violated the Act by suspending Rosenberg on December 28, 1990, and by issuing warnings to him on the above dates. The judge, however, made no findings of fact related to these allegations, and neither the General Counsel nor the Charging Party has excepted to the judge's failure to discuss them. Accordingly, we find that the record does not support the judge's conclusion that the warnings to Rosenberg cited above or his suspension violated the Act. This finding, however, does not affect our affirmation of the judge's finding that the Respondent's discharge of Rosenberg on February 28, 1991, violated Sec. 8(a)(1) and (3) of the Act.

We also do not affirm the judge's finding that Rosenberg's December 28, 1990 incident of lateness resulted in his discharge. Rather, we note that Rosenberg's discharge was precipitated by the events on February 28, 1991. As to those, the judge found, and we agree, "that the Respondent waited for just such an incident as a pretext to rid itself of the principal union activist."

the Charging Party have excepted to this conclusion. For the reasons discussed below, we find merit in these exceptions.

#### Facts

Peralta, employed by the Respondent as a road driver since December 18, 1989, became involved with the union organizing campaign as one of the Union's leading activists in July 1990. Peralta's union activity consisted of distributing union authorization cards and attending the petition hearing as the witness for the employees on August 28 and 29, 1990. On August 27, 1990, Peralta informed the Respondent's vice president of operations, Randal Tamminga, that he had been subpoenaed to appear at the hearing. Later that same day, the Respondent's vice president of safety and personnel, Mike Tallaksen, had a conversation with Peralta. The credited testimony shows that Tallaksen asked Peralta why he had been subpoenaed and also to identify the union "ring leaders." When Peralta denied knowing the identity of any "ring leader," Tallaksen asked if Peralta himself was involved with the Union. Again, Peralta denied his involvement with the Union. Tallaksen responded by threatening that if he found out the identity of the "ring leaders," "heads are going to roll."

After his attendance at the hearing and on his return to work, Peralta found the inside of his cab ransacked and his personal belongings disturbed. Peralta reported the incident to both Tamminga and the Respondent's operations manager, Dave Hoekstra, who laughed and speculated that the perpetrator may have been "another union driver."

On August 31, 1990, Peralta inquired of Hoekstra as to his work assignments for the following Saturday and Sunday.<sup>4</sup> Peralta was usually given assignments every Saturday and as often on Sunday as possible. Hoekstra responded that Peralta's weekend assignments would cease, that he would no longer be permitted to work any overtime, and that he no longer existed in the eyes of the Respondent's owner and chairman, Tom Wieranga, and the Respondent's president, Howard Hoving.

In early September 1990, Peralta also talked to dispatcher Ron Oldenberg about driving a Sunday assignment, but was told by Oldenberg that management had instructed him not to permit Peralta to work weekends. Later the same day, Peralta asked Hoving directly about his overtime assignments and about Hoekstra's comment that Peralta did not exist in the eyes of management. Hoving declined to answer Peralta's questions directly, but merely informed Peralta that he considered the issue closed and that he did not want to

discuss the matter further. The judge found that Peralta's overtime work assignments decreased, although he did work some weekends. In addition, Peralta's name was frequently "whited out" from a list of volunteers for weekend work assignments. Hoekstra, when asked by Peralta about this situation, claimed to know nothing about it.

On October 4, 1990, Peralta approached Tallaksen to inquire again about his overtime work. Tallaksen initially responded to this inquiry by interrogating Peralta about an NLRB subpoena that the Respondent had recently received. After Peralta denied knowledge of the matter, Tallaksen told Peralta to "keep his nose clean, stay straight, keep a low profile." Tallaksen then promised to assist Peralta in getting his Sunday and overtime work reinstated, cautioning Peralta to "watch your ass. They are after you and they want you." Finally, Tallaksen volunteered to Peralta that the Respondent had hired 16 new employees to "squash" the "problem with the Union and the Labor Board" and that the Respondent was willing to hire 20 or more employees to do so.

Also in October 1990, a number of conversations took place concerning Peralta between the Respondent's management and Valerie Albright,<sup>5</sup> a non-supervisory assistant to Tallaksen. Albright was told by Tallaksen in early October (or a few weeks before the representation election on November 8, 9, and 10, 1990) that Peralta was one of the employees who was "pushing for the union." In a later conversation, also placed before the union voting, Tallaksen told Albright that the Respondent was looking for a reason to terminate Peralta (as well as Herman Rosenberg, another union activist), that it would have to be after the election, but that both would definitely be terminated.<sup>6</sup>

The credited testimony also shows that, subsequent to the election on November 10, 1990, Tamminga told Peralta that, "when this union mess is done, you are done." Between November 13 and December 5, 1990, the Respondent also issued several warnings to Peralta for his inability to be available for work because of his function in the election; for his request for an early dispatch on the Monday following the election; and for allegedly being late to work. Also in December 1990, the Respondent suspended Peralta for 3 days, citing two prior incidents of tardiness in addition to the one in December. Finally, the Respondent discharged Peralta on April 30, 1991, allegedly for parking a loaded trailer in an unauthorized truckstop.

<sup>5</sup> The judge appears to have credited Albright's testimony in its entirety. He found Albright to be an honest witness and stated that her testimony was candid, honest, plausible, and credible.

<sup>6</sup> In yet another conversation, placed about a week before the election, dispatcher Hoekstra told Albright that the Respondent intended to cut back on Peralta's work assignments in an effort to induce Peralta to quit.

<sup>4</sup> At the time of Peralta's inquiry, Hoekstra was a dispatcher. He became the operations manager in January 1991. The Respondent admits this manager slot is a supervisory position.

### Analysis

The judge found numerous violations directed at Peralta<sup>7</sup> and that Peralta lost a “significant” amount of overtime pay and conceded that an inference was possible that this reduction was “union related,” but he nevertheless dismissed this aspect of the complaint. In dismissing this allegation, he noted that Tallaksen had ordered a reduction in Peralta’s overtime and 7-day workweek in June 1990<sup>8</sup> and concluded that the reduction in Peralta’s overtime was “effectuated” prior to Peralta’s union activity, which began in July 1990. He also found that the reduction in late August 1990 was a “direct result” of the June 1990 incident report. In addition, he noted that the extent of Peralta’s reduction in overtime, if at all, as a result of his union activity is unclear. He also found that other drivers with similar seniority also worked on a reduced schedule at a reduced level of income. Therefore, he concluded that the record does not establish that any reduction in Peralta’s income was directly attributable to his union activity. We are persuaded, for the reasons described below, that the Respondent has not satisfied its burden to rebut the General Counsel’s prima facie case of discrimination.

The General Counsel has established a strong prima facie case that Peralta’s weekend and overtime work assignments were reduced as a result of his union activity. Here, the Respondent admits that it had knowledge of Peralta’s union activity. Further, the numerous 8(a)(1) violations consisting of interrogations, threats, and promises, including many aimed directly at Peralta—amply establish the requisite element of union animus.<sup>9</sup> Finally, the credited testimony of Albright, an assistant to the Respondent’s vice president, Tallaksen, that Tallaksen told her that the Respondent intended to terminate Peralta after the election is evidence of the Respondent’s discriminatory motive.

We disagree with the judge that the Respondent carried its *Wright Line* burden because we find that the record fails to support his finding that the reduction in Peralta’s overtime and weekend work was either effec-

tuated prior to Peralta’s union activity or that the reduction in August 1990 was related to that incident report.<sup>10</sup>

The Respondent has not established that Tallaksen told dispatch, or that dispatch was otherwise informed, of the incident report at the time it was made on June 13, 1990.<sup>11</sup> The payroll records in evidence as the General Counsel’s exhibit do not show a decrease in Peralta’s average weekly earnings (as would be expected after an implemented reduction in overtime hours) immediately following the June 1990 report. Rather, the payroll records reveal that Peralta’s average weekly earnings remained approximately the same or even increased after June 1990, and began to discernibly decrease only after August 1990. Indeed, the record is silent on the matter of the incident report until August 31, 1990. On that date—2-1/2 months after the incident report and just 2 days after Peralta served as an observer at a Board hearing in the representation case—Peralta discussed his weekend assignment with dispatcher Hoekstra. The credited testimony shows that Hoekstra informed Peralta that his weekend work assignments would cease, that he would no longer be permitted overtime work, and that he “no longer exists” in the view of management. When Peralta questioned the Respondent’s president, Hoving, about Hoekstra’s statements, Hoving responded that he considered the issue closed and did not care to discuss the matter any longer. We note that if the Respondent’s motive for the reduction was based on Tallaksen’s June 1990 incident report, this simple explanation could have been conveyed by Hoving to Peralta. Indeed, Hoving’s failure to repudiate Hoekstra’s comments suggests that he confirmed them.<sup>12</sup> Additionally, soon after these conversations,

<sup>7</sup> The judge found, and we agree, that the Respondent violated the Act by Tallaksen’s interrogation and threatening of Peralta on August 27, 1990; by Tallaksen’s threats and promises related to Peralta’s weekend and overtime work on October 4, 1990; by Tamminga’s threats to Peralta on November 10, 1990; by issuing warnings to Peralta between November 13 and December 5, 1990; by suspending Peralta in December 1990; and by discharging Peralta on April 30, 1991.

<sup>8</sup> The evidence relating to this finding consists of the Respondent’s internal incident report dated June 13, 1990, signed by Tallaksen, which explains that he went over Peralta’s logbook with him and informed Peralta that he “cannot log off duty when he is working and he can’t work 7 days a week as he [sic] will put him over 70 hrs.” (Emphasis added.) In the “Action Taken” space on the form, Tallaksen wrote “Told dispatch not to work Ed [Peralta] 7 days a week.”

<sup>9</sup> See fn. 4, supra.

<sup>10</sup> We do not take issue with the Respondent’s claim that the June 1990 incident report was motivated by its attempt to comply with Federal regulations, which prohibit drivers from working more than 70 hours per consecutive 8-day period and by its concern at that time, pursuant to this regulation, that if Peralta worked the “Sunday shuttle” he could be unavailable for work early on Monday mornings.

<sup>11</sup> The judge found that “Tallaksen had instructed the dispatch office already in June 1990 not to permit Peralta to work 7 days a week. [Tr. 880; R. Exh. 13.]” Our review of the transcript reveals that Tallaksen testified only that he “told [Peralta] he couldn’t work seven days a week.” Although R. Exh. 13 indicates that Tallaksen told dispatch of the incident report, we note that Tallaksen did not testify that he had told dispatch nor did he testify that he had told Peralta that dispatch was informed of the incident report. There is also no corroborating testimony from dispatch that it was informed on that day. Thus, Tallaksen’s testimony fails to corroborate R. Exh. 13 and, indeed, it contradicts that exhibit.

<sup>12</sup> We also note Hoekstra’s conversation with Albright, in which he indicated that the Respondent intended to reduce Peralta’s work assignments in an attempt to induce him to quit (see fn. 4). Although we cannot attribute this statement of Hoekstra to the Respondent (he was a dispatcher at the time he made it and, thus, not a supervisor), the conversations between Hoekstra and Peralta, Peralta and Hoving, and Hoekstra and Albright—taken together—strongly suggest that

dispatcher Oldenberg told Peralta in early September that he had received instructions from management that Peralta could not work on weekends. This testimony suggests that the dispatchers were not informed of the reduction in Peralta's hours until late August or early September, after the Respondent's knowledge of Peralta's union activity.

It is also significant that both Hoekstra's and Oldenberg's statements describe new limitations on Peralta's work schedule that go well beyond the June 1990 incident report. That report indicated only that Peralta would not be allowed to work 7 days a week, or more than 70 hours in an 8-day period. Hoekstra informed Peralta, however, that his weekend and overtime work would cease entirely. Oldenberg also informed Peralta that he could not work weekends at all. Thus, the Respondent's reliance on the June 1990 report to explain the reduction in Peralta's overtime hours is undermined not only by the delay in implementing it but also by the imposition of different and harsher terms.

The Respondent's asserted reason for the reduction in Peralta's overtime hours also is belied by Tallaksen's comments to Peralta on October 4, 1990. The credited testimony establishes that Tallaksen, the author of the June 1990 incident report, promised to intercede with management to restore Peralta's Sunday and overtime work, and cautioned that management was after him. The judge found, and we agree, that these statements violated Section 8(a)(1) of the Act. These promises, then, that Tallaksen would lobby upper management to reinstate Peralta's overtime and weekend hours (if Peralta kept his nose clean, stayed straight, and kept a low profile) establish that Peralta's overtime hours were being reduced for union reasons and not because of Tallaksen's June 1990 report.

In sum, we find that the Respondent failed to show that the reduction in Peralta's overtime and weekend hours resulted from the June 1990 incident report. Rather, the record establishes that the Respondent reduced Peralta's overtime and weekend hours only after it learned of his union activities in August 1990. At that time, contrary to the language of the June 1990 incident report, Peralta was told that his overtime and weekend work would be eliminated, not merely reduced to 70 hours in an 8-day period. Therefore, the Respondent's reliance on the June 1990 report to explain the reduction in Peralta's overtime and weekend work after August 1990 is pretextual. This is especially

what Hoekstra told Albright was not based on mere conjecture but accurately represented the Respondent's motive for conversations, dispatcher Oldenberg told Peralta in early reducing Peralta's overtime and weekend hours. Thus, Hoekstra's statements to Peralta, which were effectively confirmed by Hoving, coupled with Hoekstra's statements to Albright, indicate that Hoekstra, as the Respondent's dispatcher, had knowledge of the Respondent's discriminatory intent relating to Peralta's work assignments.

true in light of both Albright's testimony about the Respondent's general intent to terminate Peralta and Tallaksen's unlawful promises and threats specifically related to Peralta's work assignments. Thus, we cannot agree that Peralta's overtime reduction was "effected" prior to his union activities or that such reduction in August 1990 was a "direct result" of that report. Accordingly, we conclude that the Respondent has failed to rebut the prima facie case of discrimination,<sup>13</sup> and that by reducing Peralta's weekend and overtime work, causing him to suffer a loss of income,<sup>14</sup> the Respondent has violated Section 8(a)(3) of the Act.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 9.

"9. By reducing the overtime and weekend assignments of Edward Peralta causing him to suffer a loss of income because of his union activity, the Respondent violated Section 8(a)(3) of the Act.

"10. By warning Herman William Rosenberg, by warning and suspending Edward Peralta, and by discharging them and Dean Ridder and Dean Jones because of their union activities, the Respondent violated Section 8(a)(1) and (3) of the Act."

#### ADDITIONAL REMEDY

Having unlawfully reduced the overtime and weekend assignments of Edward Peralta, the Respondent shall make him whole for any loss of earnings he may have suffered by reason of discrimination against him with interest. Backpay will be the computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>13</sup> We note that the judge's reliance on the fact that other drivers also worked at a reduced level of income is also not compelling. Even assuming that average weekly earnings decreased for these drivers, the record is devoid of any explanation for such a decrease and we note that the Respondent has declined to posit one. If the Respondent's rebuttal argument is that it did not single out Peralta for discriminatory treatment, but rather reduced all drivers' overtime and weekend hours in an equal or nondisparate fashion, it has the burden of coming forward with evidence of such a general plan. It is not enough for the Respondent merely to show that other employees' income also decreased.

<sup>14</sup> The General Counsel, the Charging Party, and the Respondent each have urged their respective methods of computation of Peralta's loss of income (or lack thereof). Although we do not adopt any one of these methods, we do find that Peralta's earnings discernibly decreased as a result of the Respondent's unlawful discrimination, and that such a decrease was greater than de minimis. We leave to compliance the determination of the exact amount of that loss.

## ORDER

The Respondent, Carry Companies of Illinois, Inc., Bridgeview, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in the surveillance of employees' union activity.

(b) Coercively interrogating its employees concerning their union activities.

(c) Threatening employees with discharge, loss of employment, or loss of overtime work because of their union activities.

(d) Promulgating an overly broad no-solicitation rule forbidding union solicitation on company time.

(e) Intimidating employees and interfering with their protected rights.

(f) Threatening employees to hire additional employees in order to defeat the Union or promising employees to restore overtime work if they refrain from their union activity.

(g) Reducing employees' overtime and weekend work assignments because of their union activities.

(h) Warning, suspending, or discharging employees because of their union activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dean Jones, Dean Ridder, Herman William Rosenberg, and Edward Peralta immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, including reductions in overtime and weekend work assignments, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful discharges of the discharged employees, any references to the warnings or suspensions of Edward Peralta, and the warning of Herman William Rosenberg, and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.<sup>15</sup>

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

<sup>15</sup> We have modified the judge's notice to conform to the language in par. 2(b) of his recommended Order.

(d) Post at its Bridgeview, Illinois, and Lafayette, Indiana<sup>16</sup> facilities copies of the attached notice marked "Appendix."<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>16</sup> We have modified the judge's recommended Order to require the Respondent to post the attached notice at its Lafayette, Indiana facility in addition to its Bridgeview, Illinois facility. In so doing, we note that discriminatee Dean Jones was based out of the Lafayette terminal. Accordingly, we find it appropriate to notify any other employees employed out of that facility of the Respondent's unlawful action and of its assurances that other employees will not be similarly adversely affected because of their union activities.

<sup>17</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in any surveillance of our employees' union activities.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT threaten employees with discharge, loss of employment, or loss of overtime work because of their union activities.

WE WILL NOT promulgate an overly broad no-solicitation rule forbidding union solicitation on company time.

WE WILL NOT intimidate or interfere with the employees' protected rights.

WE WILL NOT threaten to hire additional employees in order to defeat the Union or promise to restore their overtime work if they refrain from their union activity.

WE WILL NOT reduce the overtime or weekend work assignments of our employees because of their union activities.

WE WILL NOT issue warnings, suspensions, or discharges or otherwise discriminate against our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dean Jones, Dean Ridder, Herman William Rosenberg, and Edward Peralta full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination practiced against them, with interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL notify Edward Peralta that we have removed from our files any reference to his warnings or suspension and WE WILL notify Herman William Rosenberg that we have removed from our files any references to his warning.

#### CARRY COMPANIES OF ILLINOIS, INC.

*Richard S. Andrews and Aaron Karsh, Esqs.*, for the General Counsel.

*Frederic H. Fischer and James R. Beyer, Esqs. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent.

*Martin P. Barr and William A. Widmer III, Esqs. (Carmell, Charone, Widmer, Mathews & Moss, Ltd.)*, of Chicago, Illinois, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried at Chicago, Illinois, on August 12–15 and September 3–6, 1991. The charges were filed by Local 705, International Brotherhood of Teamsters, AFL–CIO<sup>1</sup> (the Union) on September 17, 1990, in Case 13–CA–29715, on October 16, 1990, in Case 13–CA–29768, on December 5, 1990, in Case 13–CA–29910, on March 4, 1991, in Case 13–CA–30075 as amended on April 1, 1991, and on May 2, 1991, in Case 13–CA–30219. The consolidated complaint in Cases 13–CA–29715, 13–CA–29768, and 13–CA–29910 issued on February 28, 1991; an order consolidating those cases and Case 13–CA–30075 issued on May 22, 1991. A report on challenged ballots and objections and an order consolidating those cases with Case 13–RC–18093 issued on May 30, 1991.<sup>2</sup> And an order further consolidating the cases with Case 13–CA–30219 issued on June 12, 1991.

<sup>1</sup>The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup>By order, dated March 20, 1992, Case 13–RC–18093 was severed and remanded to the Regional Director. The objections are accordingly no longer a part of the consolidated cases here.

The Respondent filed timely answers in which the jurisdictional elements of the complaint were admitted and the substantive allegations of unfair labor practices were denied.

The alleged violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) include threats of discharge and other reprisals because of the employees' union activity, unlawful interrogations of employees about their union activities, unlawful surveillance of employees' union activities, the promulgation and enforcement of overly broad no-solicitation rules, and the unlawful discharges and other discriminatory treatment of five employees.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Company, and the Union, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company, Carry Companies of Illinois, Inc., located in Bridgeview, Illinois, has been engaged in the transportation, distribution, warehousing, and packaging of dry food products and sterilization of tanks. In 1990, a representative period, the Respondent sold and shipped from its Bridgeview, Illinois facility products and materials valued in excess of \$50,000 directly to points outside the State of Illinois. The Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Local 705, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### II. BACKGROUND

In the fall of 1989, Herman Rosenberg, an employee of Carry Companies, contacted the Union, Local 705, and set up a meeting to be held in January 1990 (Tr. 64, 768). Rosenberg and two other truckdrivers met with the union representatives, Richard Mall and Sam Tenuta, to discuss the employees' interest in union representation. The union agents explained the benefits and handed out union literature and union authorization cards (Tr. 65, 769). During a period after the meeting, Rosenberg distributed union cards to fellow employees, the "city" drivers, and eventually received approximately 75 signed cards. Another employee, Edward Peralta, who was classified as a "road driver," assisted the union campaign by soliciting the road drivers for the Union and by requesting them to sign union cards. Employees Dean Ridder, Dean Jones, and Raymond Krause also assisted the union campaign (Tr. 67).

On August 6, 1990, the Union filed a petition in Case 13–RC–18093 to represent the Respondent's mechanics and drivers. Pursuant to a Decision and Direction of Election issued by the Regional Director on October 3, 1990, an election was conducted on November 8, 9, and 10, 1990, involving two separate units, one for mechanics and the other for the drivers (G.C. Exh. 1(u); R. Exh. 5). The National Labor Relations Board dismissed the petition of the Union to represent Respondent's mechanics as a separate unit (R. Exh. 6). With respect to the unit of drivers, the election revealed that the Union received 42 votes, 77 were against the Union and 62 ballots were challenged. The challenges and objections

filed by the Union were ordered consolidated with the hearing in this case by order of May 30, 1991.<sup>3</sup>

### III. THE CORPORATE HIERARCHY AND SUMMARY OF ITS REACTION TO THE UNION CAMPAIGN

Carry Companies of Illinois, Inc. includes an operation known as Carry Transit which performs the transportation function and a warehouse operation known as Hollander Distribution Services. In addition to the headquarters in Bridgeview, Illinois, the Respondent maintains facilities in Decatur, Illinois; Lafayette, Indiana; Weaver, Iowa; Dayton, Ohio; Vassar, Michigan; Lakeland, Florida; and Morrisville, Pennsylvania. The owner and chairman of Carry Companies is Tom Wieranga, the president is George Van Denend, and president of Carry Transit, the subsidiary, is Howard Hoving (Tr. 815–817). Other admitted supervisors are: Tim Van Denend, vice president of Hollander Distribution, Randal Tamminga, vice president of operations, Mike Tallaksen, vice president of safety and personnel, and Dave Hoekstra,<sup>4</sup> operations manager or manager of tank fleet operations (Tr. 821, 1188, 1345, 1414; G.C. Exh. 1(t)). Prior to January 1991, when Hoekstra functioned as dispatcher, he was, according to the General Counsel, also a supervisor within the meaning of Section 2(11) of the Act.

The Regional Director's decision in Case 13–RC–18093 that dispatchers at Carry Companies are not supervisor employees was affirmed by the Board (R. Exhs. 5, 6).

The record here shows that the dispatchers, including Hoekstra, possessed none of the indicia enunciated in Section 2(11) of the Act with the possible exception of the authority to assign or responsibly to direct the drivers. In that regard, the record shows that dispatchers used their discretion in directing the drivers and generally had wide latitude in assigning work. Dispatchers assigned work without prior consultation with higher supervision and based on their own evaluation of the availability of a driver, also considering the mileage of a particular trip, the load time, as well as weather and the traffic conditions. Randal Tamminga, vice president of operations and a former dispatcher, testified that dispatchers supervise the drivers (Tr. 1235). Dispatchers make the work assignments and inform drivers where to drive to pick up a load. Dispatchers are contacted when drivers encounter problems during their assignments (Tr. 1167–1170, 1333, 1365). For example, Hoekstra dispatched Edward Peralta to California, because he was experienced, qualified, and was rested and ready to go (Tr. 1222–1223). Dispatchers also sign timecards when drivers failed to punch in or out, and they fill out and sign "incident warning notices" or "incident reports" on forms in a space marked "supervisor" (G.C. Exhs. 14, 15, 18; Tr. 1365). In this regard, they function more like observers and reporters of employee misconduct than as disciplinarians. Nevertheless, dispatchers do not approve sick leave, grant time off, or make recommendations for discipline. In determining which driver to dispatch for a particular assignment, dispatchers consider certain established

criteria. (Tr. 1371–1386.) About half of the Respondent's dispatchers are paid a salary, the other half are paid on an hourly basis. Dispatchers occasionally drive when the need arises. I find no basis in the record in this case to warrant reversing the finding of the Regional Director as affirmed by the Board, and it is my conclusion that dispatchers, including Hoekstra in his position as a dispatcher prior to January 1, 1991, are not supervisors within the meaning of the Act. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1080 (1985); *Connecticut Distributors v. NLRB*, 681 F.2d 127 (2d Cir. 1982); *NLRB v. Hale Container Line*, 943 F.2d 394 (4th Cir. 1991).<sup>5</sup>

The record shows that the principal union activists, Herman Williams Rosenberg, Edward Peralta, Dean Ridder, Raymond Krause, and Dean Jones, were discharged under different circumstances during and after the union campaign. The General Counsel and the Charging Party have taken the position that the discharges were motivated by the Employer's union animus and that management threatened some of these employees with reprisals because of their union support, and that others were interrogated about their union activity.<sup>6</sup> The Respondent argues strongly that none of the discharges were related to the employees' union activity, that management was unaware of the union activities of certain employees, and that each discharge was the result of the employees' misconduct. Following threats to discharge employees who engaged in union activities, the Respondent discharged Dean Ridder on July 17, 1990, ostensibly for the offense of urinating in the trailer yard (G.C. Exh. 14). On July 19, 1990, the Respondent discharged Raymond Krause because, according to the Company, "he stole time" from the Company (G.C. Exh. 21). These discharges occurred approximately 3 weeks prior to the Union's petition filed on August 6, 1990.

On October 2, 1990—approximately 1 month prior to the election on November 8, 9, and 10, 1990—the Respondent discharged Dean Jones with the justification that he operated a company vehicle with an unauthorized passenger, namely, his son (G.C. Exh. 1(u), 17).

Drivers Rosenberg and Peralta functioned as union observers during the election. Following incidents of tardiness for work and a suspension on December 25, 1990, Rosenberg was terminated on February 25, 1991, based on being "three times late in a 6-month period" (G.C. Exhs. 3(h), (m)). And Peralta, who was assigned by Hoekstra to a trip to California on November 5, 1990, even though it would have interfered with his schedule as a union observer during that time and who received several warning notices during the course of the ensuing months, was finally discharged on April 30, 1991. The Company based the discharge on his unauthorized dropping or parking the trailer at a truckstop close to his home (G.C. Exhs. 10(a)–(e), (i), and (j)).

The Company's union-related motive for the discharges of Rosenberg and Peralta are well illustrated by the credible testimony of Valerie Albright, who was employed by the Company from August to December 1990 as assistant safety di-

<sup>3</sup> As already stated, on motion by the Union, Case 13–RC–18093 was severed from this case and remanded to the Regional Director.

<sup>4</sup> The Respondent's motion to amend his answer was granted showing that Hoekstra became operations manager as of January 1, 1991, and that he was a dispatcher prior to that date. The Respondent disputes his supervisory status prior to January 1, 1991.

<sup>5</sup> The 8(a)(1) allegations in the complaint involving Hoekstra and other dispatchers are therefore not supported by the record.

<sup>6</sup> The General Counsel's motions to amend the complaint with substantive allegations are denied with the exception of a few incidents which are closely related to and repetitions of existing allegations.

rector in the office of Mike Tallaksen, vice president of safety and personnel (Tr. 740). According to Albright, Tallaksen “asked [her] if [she] wanted to know who was really pushing for the union. [She] said yes, and then he told [her] it was Bill Rosenberg and Eddie Peralta” (Tr. 742). She also testified as follows (Tr. 748):

That they were going to definitely find a way to terminate Bill Rosenberg and Eddie Peralta, but it would have to be something legitimate. But they couldn’t do it before the union voting because it would come up in a trial for the purpose that they would think that they had terminated them for wanting the union into the company. But they said that once the union vote was over, that they were definitely going to work something out to terminate them. That they were definitely out.

The Respondent argues that although Carry knew that Peralta and Rosenberg were union advocates, this does not mean that they could engage in misconduct with impunity, indeed, “the Company knew that Peralta and Rosenberg would file unfair labor practice charges if they were terminated and therefore knew they would have to justify any decision to terminate their employment, no matter how valid a reason they had for the termination.” (R. Br. 65.) The Respondent, however, denied any knowledge that Jones, Krause, or Ridder had engaged in any union activity (R. Br. 29, 43, 58). Accordingly, their discharges could not have been union related under the Respondent’s theory. The Respondent further argues that it terminated those employees for legitimate reasons and that none of the employees were threatened, interrogated, or otherwise coerced about their union activities.

#### IV. ALLEGED VIOLATIONS

The first incident of alleged misconduct occurred in June 1990. According to the testimony of Raymond Krause, Howard Hoving, president of Carry Transit, came out of his office on June 7, 1990, and saw four or five drivers, including Krause, in the hallway of the dispatch office. The other drivers identified by Krause were Rosenberg, Tony Rhodes, and Al Kraal. Krause testified as follows (Tr. 615):

Mr. Hoving came out of his office and asked how we were doing and how things were going. We voiced our opinion. He said that there is an awful lot of congregating going on out in the hallways, in the parking lots, a lot of men spending time smoking cigarettes out here and drinking coffee. He said that is all going to come to a screeching halt, because he has new work rules coming out next month.

Right after that he said he heard there was union activities going on on the premises, on company premises in Bridgeview and on company time, and if he finds out who it is, he is going to fire him.

In his testimony, Hoving denied threatening the employees or engaging in a conversation with them. He further stated that the four or five other drivers identified by Krause could not have been at the Bridgeview terminal at one point in time based on his examination of the dispatch sheets (Tr. 1131, 1134–1136; R. Exh. 21). My analysis of the dispatch sheets reveals that drivers Kraai, Rosenberg, and Krause,

who was driving the shuttle, could have been together at the terminal that day shortly after 2 p.m.; however, the other driver, Tony Rhodes, left the terminal at 2 p.m. and could not have been among them as Krause testified. It is accordingly unlikely that the conversation occurred as recalled by Krause. In view of Hoving’s unequivocal denial of the conversation, I credit his testimony and find that he did not make the threat attributed to him, nor did he promulgate an unlawfully broad no-solicitation rule, as alleged in the complaint.

*The Discharge of Raymond Krause.* The termination of Krause on July 19, 1990, “for theft of Company time” was, according to the General Counsel and the Charging Party, motivated by his union activity. But the Respondent argues emphatically that it was not even aware of Krause’s union activity and did not have a pretextual reason. Krause was hired on January 25, 1989, and worked as a city driver and as a road driver. Krause first learned about the Union in November 1989 from Rosenberg and other drivers. In May 1990, he had a conversation with Rosenberg in the Company’s parking lot. Thereafter, he signed a union authorization card, distributed about 30 to 35 union cards to other drivers, and discussed the benefits of the Union with them (Tr. 611, 617).

Krause attended a meeting in May 1990 in the conference room with other drivers and two representatives from management, Howard Hoving and Tim Van Denend. The purpose of the meeting was to iron out any difficulties with dispatch, to discuss company benefits, pay raises, mileage rates, and hourly rates. Krause asked Hoving during the meeting whether the employees deserved a pay raise of some sort. Hoving replied, “Are you trying to put me on the spot,” but agreed, saying, “yes, I do” (Tr. 613–614). Krause had another meeting with Hoving in the end of June 1990. Hoving called Krause into his office and said: “Ray I would like for you to set a good example amongst the other workers at Carry Companies by quit complaining about dispatching, the hours you are spending on your pickups and deliveries. Quit complaining and set a good example and be a better worker and calm down. If you have any problems, come into my office and see me and we will try to straighten them out ourselves, between us.” (Tr. 616.) Krause replied that he had the same complaint right now, that he had 6 months ago, a year ago, and that he hoped that he did not have the same complaint 6 months from now. Krause thanked Hoving for the opportunity to resolve problems with pay and dispatch and left the office (Tr. 617).

The incident giving rise to the discharge began on July 16, 1991, when Krause was dispatched to pick up a load for Borden Company in Milwaukee, Wisconsin. He arrived at Borden at 9 a.m. on July 17, finished discharging the load at 11 or 11:05 a.m., and, according to his testimony, returned to the Bridgewater terminal at 1:35 or 1:40 p.m. He parked his truck, completed his reports, and, after being told that there was no more work, he punched out at 2 p.m. (Tr. 621–623). According to the Respondent’s version of the events, Krause lingered in the terminal from 1:15 p.m., the time he actually arrived, until 2 p.m., when he punched out (G.C. Exhs. 19, 21). Dispatcher Van Bruggen testified that Krause returned from Milwaukee at approximately 1 p.m. and was dismissed for the day. However, at 2 p.m., when Van Bruggen proceeded to punch out, he observed that Krause

was still in the dispatch area and that he punched the time-clock as Van Bruggen was leaving (Tr. 1285). An incident report was completed by Al Kraai, stating (G.C. Exh. 19):

Ray was dispatched for next day at 1:15, was told he was done for the day, waited until 2:00 p.m. to punch out. Incident was noticed by Wes & Al. Suspended 7-19—pending investigation.

Tallaksen testified that he relied on the reports of both dispatchers, Kraai and Van Bruggen, as well as his own investigation of the timing of the return trip. He testified that he was unaware of Krause's union activity (Tr. 840-849, 977). According to Tallaksen, Kraai reported to him that Krause had been observed at 1:15 p.m. in the dispatch area and did not punch out until 2 p.m. Tallaksen checked with the other dispatcher, Van Bruggen, at his home to verify the information. Krause's travel from Hammond, Indiana, to Borden in Milwaukee was in excess of 100 miles and was therefore paid according to mileage, but the return trip from Borden to the Bridgeview terminal was less than 100 miles which means that the driver returns "on the clock" (Tr. 841). Tallaksen with his own car checked the time it took from the Lake Forest Oasis, the last stop Krause made, and he also checked with the receiving office at Borden to establish when Krause left. In the meantime he had been in contact with Krause and informed him that he was suspended pending review of the trip from Milwaukee. He testified, "I had discussed with Ray the distance, the time it took, what Borden had told me about the time that he left there. Ray stated it wasn't possible." (Tr. 848.) Tallaksen became convinced that his dispatchers were correct and made the decision to discharge Krause (Tr. 977).

The General Counsel argues that Tallaksen's time estimates were erroneous and that Krause could not have arrived in Bridgeview earlier than 1:35 or 1:40 p.m. For example, a driver leaving around 10:50 a.m. or 11 a.m. from Borden's facility to the Bridgeview terminal would need about 2-1/2 hours for the 97-mile trip. Considering Krause's stop at the Lake Forest Oasis to make a telephone call to the dispatch office would make an arrival time at 1:35 or 1:40 p.m. a reasonable estimate, argues the General Counsel.

I find that Tallaksen reasonably relied on the report of his two dispatchers and his estimate of the duration of the return time of the driver. Moreover, I find Tallaksen's testimony on this issue credible, particularly when compared to that of Krause. Krause's testimony was at times unreliable and contradictory. For example, he testified that the time 11 a.m. on the dispatch sheet reflects the time when he "finished pumping off the load" and that prior to leaving the Borden facility the truck had to be weighed and paperwork had to be completed with an additional delay of 15 to 20 minutes prior to departure. He then changed his testimony to reflect that the 11 a.m. time showed actual departure time and he finally conceded that the 11 a.m. time which he noted on the report was inaccurate (Tr. 1491-1492). Under these circumstances, the Respondent was justified to conclude that this employee had engaged in the conduct it referred to as "stealing time." Krause's prior misconduct includes a written notice, dated February 10, 1990, reporting "log falsification" and two written warnings in 1989, one for failing to turn in his logs

and another for driving in excess of the 10-hour driving rule (R. Exhs. 1-3).

I also agree with the Respondent that the record does not support a finding that Krause's discharge was the result of any disparate treatment, such as the current employment of drivers who were accused of the same conduct. The Company's Rules of Conduct contained in the employee manual provides for but does not mandate "progressive discipline" for such offenses as "loafing" or "falsifying company records" or "making false claims" (G.C. Exh. 20). In spite of evidence of a poor work record, the record is not clear whether the Company relied on Krause's past violations of company rules. Tallaksen explained that the Company's policy is one of progressive discipline, but, on occasion a driver may be discharged after the first offense (Tr. 832, 946, 967). I also find that despite Krause's extensive union activity, the record does not support a finding that management was aware of his union activity. Krause may have been observed by dispatchers as he talked to other drivers about the Union; however, an inference that dispatchers informed management would be speculative. And the various conversations between Hoving and Krause did not pertain to the Union or the union campaign. Neither can the General Counsel nor the Charging Party rely on the small-plant doctrine considering the size of the Respondent's operation. In short the record does not establish any causal connection between Krause's discharge and his union activity. I accordingly dismiss the 8(a)(1) and (3) allegations involving this employee.

*The Discharge of Dean Ridder* 4.7 According to the Respondent, there was hardly "an employee whose termination was more justified than Dean Ridder" (R. Br. p. 42). Yet the Respondent and the Charging Party argue that the discharge was motivated by union animus and discriminatory as alleged in the complaint.

Ridder began his employment at Carry in July 1985 and was discharged effective July 20, 1990, as a warehouse employee. He first learned about the Union in April 1990 from some of the drivers, and recalled he asked Alvin Harks about the Union (Tr. 492):

I asked Mr. Harks what he thought about the union, and Mr. Harks' reply was that if the union was brought in that Mr. Wieranga would close the doors.

Ridder referred to Harks as his supervisor; however, the record shows that Harks was employed on a full-time basis at Carry from March 3, 1986, to June 1, 1988, to establish a warehouse operation and contract packaging (Tr. 1260-1268). After that date until the end of 1990, Harks worked on a consulting basis 20 to 30 hours a week and did not possess any indicia of supervisory authority (Tr. 1262-1272). He routinely reported infractions of company rules to management but did not make any recommendations that employees be disciplined. In that capacity he also reported an incident to management that Ridder had urinated outside in the yard by the stairs in the propane tank area (Tr. 1258; G.C. Exh. 14). Harks did not recommend any discipline and can generally not be considered a supervisor within the meaning of the Act.

<sup>7</sup> The General Counsel's motion to correct the transcript is granted to reflect that "Ritter" should read "Ridder."

Ridder credibly testified about another conversation which occurred while his supervisor, Dave Amthor, verbally reprimanded Ridder for loading too many pallets on a truck (Tr. 496, 531). Ridder's reply to the reprimand was "it would never happen again." As Ridder was about to leave, Amthor said, "the union was a crazy idea." Supervisor Amthor did not testify but this comment coming from an admitted supervisor shows that management knew or suspected Ridder's involvement with the Union.

On July 16, 1990, Ridder was in the shipping office and discussed the Union with Art Belstra, a fellow employee, in the presence of Supervisor Kevin Oezer. Ridder informed Belstra that the "drivers of Carry Transit had enough authorization cards signed to have an election for the union, and that the warehousemen should decide what they were going to do" (Tr. 499). Belstra said that he did not think that the Union was the answer to their problems, although management asked a lot of them. As he left the room, Supervisor Oezer "said that he didn't think the union was the answer to [their] problems" (Tr. 500).

On July 20, 1990, Ridder was assigned to loading barrels into a trailer. He needed a wooden block to brace the load and was ordered by Amthor to look for one in the mechanics shop or in the yard. While he tried to find a wooden block in the yard outside the shipping office, Ridder felt the need to go to the bathroom. Instead of using the inside bathroom because of a locked door, Ridder "found a discrete place and began urinating" (Tr. 501). At that moment, Harks walked by and observed Ridder. Harks laughed at Ridder's comment "Ha-ha, Al, you caught me" (Tr. 501). A few hours later at approximately 2:30 p.m., Ridder learned that Tim Van Denend, vice president in charge of the warehouse operation, wanted to see him outside. Van Denend informed Ridder that he was fired for urinating outside the building (Tr. 504). According to Van Denend, Ridder was discharged after Harks had reported the incident and that Ridder's past performance was a contributing factor (Tr. 1414). Ridder's past history with the Company shows that he was fired in 1987 for using abusive language. One week later he was rehired as a driver. Some time later in 1987 he was discharged for driving under the influence (DUI) and rehired within days. In 1989 he was fired for a similar incident and rehired after 10 days and assigned to work in the warehouse (Tr. 506-509). Ridder also received several verbal warnings, including a reminder by his supervisor, Belstra, to clean up around his working area (Tr. 518-519, 540-541). Nevertheless, by letter of April 2, 1990, Howard Hoving, the Company's president, wrote the following comments to the local court on behalf of Dean Ridder (G.C. Exh. 13).

We are writing this correspondence in an effort to express our satisfaction with the progress made by Dean Ridder since his last DUI. Through many conversations with Dean in the recent past, it is apparent that he has a very strong commitment to turning his life around. We have observed his steady growth both emotionally and spiritually. It appears that he has accepted full responsibility for his past mistakes and is committed to face the future without a reliance on alcohol. It is our sincere desire that, through Dean's ongoing association with Alcoholics Anonymous, he will continue to progress in his quest to defeat this illness.

The record shows extensively that other employees had urinated in the yard without receiving any discipline. Ridder testified that he had observed supervisors engaging in such conduct, as for example Hoving several times and Tamminga on one occasion (Tr. 504-505, 513). Peralta testified that he observed dispatchers and other drivers urinating outside, including the area between the tires of a truck (Tr. 292-293). Robert Flutman and Tom Kampen, former truckdrivers at Carry, testified that it was a common practice for drivers to relieve themselves in the Bridgeview terminal parking lot (Tr. 175, 435). Another driver, Dean Jones, recalled having been observed by Supervisor Tamminga as he went behind the trailer, yet Jones was not reprimanded (Tr. 581). Krause also testified that drivers and dispatchers used the outside premises to relieve themselves (Tr. 640, 659, 668-669). In the face of such overwhelming record evidence that the conduct for which Ridder was fired had been a common practice among the employees, including dispatchers and supervisors,<sup>8</sup> Van Denend's testimony that he never saw any Carry employee engage in such misconduct is unconvincing. In any case, it does not resolve the issue whether the Company had otherwise known and tolerated the practice by other employees. The only time the Respondent rebuked someone for such conduct involved an employee of another company as he used the Respondent's property.

The record is clear that the Respondent's reaction to Ridder's misconduct constituted disparate treatment. Considering Ridder's past infractions which the Respondent had repeatedly tolerated and excused as recently as April 1990, as evidenced by Hoving's letter the inference is clear. The Company used this incident as a pretext to rid itself of a union supporter. The record shows that Ridder actively participated in the union drive. He signed a union authorization card, spoke about the Union with Rosenberg and other drivers, solicited among the warehouse employees, and distributed union cards to them. He also spoke about the Union in the presence of Supervisors Amthor and Oezer (Tr. 493-500). Oezer's comment directed at Ridder that the Union was not the answer to the employees' problems, as well as Amthor's remark that the Union was a crazy idea, indicate Respondent's antiunion animus and its knowledge of Ridder's union support. I accordingly find that the Respondent violated Section 8(a)(1) and (3) by the discriminatory discharge of Dean Ridder.

*The Discharge of Dean Jones.* Employed as an over-the-road driver since December 4, 1986, Dean Jones was discharged on October 2, 1990 (G.C. Exhs. 16, 17). Jones was originally hired and assigned to the Bridgeview terminal. He lived in Lafayette and had recommended that a terminal be built there (Tr. 547). When the Company completed a terminal in Lafayette, Indiana, in 1988, he was assigned to that terminal. The Respondent's reason for the discharge was: "unauthorized Passengers in Truck" (G.C. Exh. 17). The General Counsel and the Charging Party argue that the real reason for his discharge was his union activity, namely, the holding of a union meeting at his home in Lafayette. In this regard, the record shows that in the spring of 1990 Jones signed a union card after meeting with Edward Peralta. At

<sup>8</sup>Ridder's demeanor as a witness seemed honest, his testimony was not inconsistent or evasive, and he freely admitted his prior misconduct. I found his testimony credible (Tr. 1145).

the request of Bill Rosenberg, Jones agreed to hold a union meeting at his home on September 15, 1990, at 9 a.m. For that purpose, he passed out directions to his home among 10 or 11 of his fellow drivers, including Willus Drescher (Tr. 549–552). The meeting dealt with union benefit and insurance plans. Jones also passed out union cards and received one signed card. Several days later, on September 27, 1990, Drescher met Jones in the Lafayette yard and told him that he had a conversation with Randal Tamminga, vice president of operations (Tr. 552).

Drescher testified about that conversation. According to Drescher, approximately 1 week after the union meeting at Jones' house, Tamminga asked him "if [he] knew of a Teamster meeting in Lafayette and Decatur, Illinois" (Tr. 593). Drescher replied, "no" and sarcastically commented, "why do we even need a Teamsters here because the dispatch is so fair for us and everything is so great" (Tr. 593). Tamminga said that he was very unhappy with one of the drivers in Lafayette, namely, Dean Jones, because "he is not working for the company, he is not Carry material" (Tr. 594).

During the chance meeting on September 27, Drescher reported to Jones the substance of this conversation with Tamminga and advised Jones to stay away from Tamminga (Tr. 594–595, 552–553).

In his testimony, Tamminga admitted the conversation with Drescher and his disparaging remark about a Lafayette driver but explained that his reference did not involve the Union, but an incident dealing with the Pepsi account (Tr. 1209–1210, 1244, 1245–1246). That dispute arose when Tamminga received a telephone call from the Pepsi customer requesting that Jones be assigned to all the deliveries to Pepsi in Indianapolis. Tamminga, suspecting that Jones had prompted the Pepsi representative to make that request, confronted Jones and caused an angry exchange among them (Tr. 578–580, 114, 1208). In any case, I credit Drescher's forthright and plausible testimony<sup>9</sup> despite Tamminga's claim that he was unaware of any union meeting, and presumably could not have interrogated Drescher about the Union.

The incident leading up to Jones' discharge occurred on Sunday at 6:30 p.m., September 30, 1990, when Jones went to the Lafayette terminal to get his tractor ready for a trip on the following day. At the terminal Jones checked the oil in the tractor, filled the gas tank, started the engine, and was about to leave the terminal when one of the attendants asked whether Jones was leaving on his assigned trip. Jones replied, no, that he and his son Brook had come to take the truck to his home to clean it. Jones, with his son in the bunk of the tractor, left the terminal and drove to his home where he washed the vehicle and cleaned the inside to prepare it for his trip in the early morning of the following day (Tr. 553–558). Jones testified that it was not unusual for his 8-year-old son to accompany him on trips between his home and the terminal, that he had done so in the past and that the Company's owner, Tom Wieranga, knew about it since the building of the terminal in Lafayette. At that time Jones had come to the terminal with his son on a Saturday when Wieranga was there and that Wieranga acknowledged it

without objecting to the practice (Tr. 556). Jones conceded in his testimony that he was aware that the Company had issued a new policy regarding the carrying of riders in company vehicles (Tr. 557, 1500–1514). But he had not seen the policy in writing and was under the impression that it applied only when he was driving on company business and not in situations when he took his son with him from the terminal to his home (Tr. 557).

Early the next morning, on October 1, 1990, Jones overslept and was about to leave his home around 5 a.m. when a dispatcher called his home and told him that he was late for his run. Jones, however, completed the delivery on time to the Pepsi customer in Munster, Indiana. Nevertheless, the dispatcher issued an incident warning notice, dated October 1990 (G.C. Exh. 15; Tr. 560–561). Jones had also incurred a prior discipline on June 17, 1990, for two violations, failure to wear a Carry uniform and being unavailable for a Saturday dispatch (G.C. Exh. 18). This report resulted in a 3-day suspension and a 30-day probation (Tr. 573–577). Except for another minor infraction, this was the extent of Jones' history of misconduct when on October 2, 1990, the Company cited him for the violation of carrying an unauthorized passenger in his truck on September 30, 1990.

The Respondent relied on a company policy entitled "Carry Transit Rider Program" which appears to be part of a collection of company bulletins and was identified as a Carry employee manual (Tr. 824; G.C. Exh. 7). The policy permits drivers "to purchase insurance that will allow [them] to take a rider with [them] for a period of up to two weeks per year" and states in pertinent paragraphs several conditions. Drivers who are caught with unauthorized riders could be terminated according to this policy. The Respondent also referred to the Federal Motor Carrier Safety Regulations, which in subpart G prohibits the transportation of unauthorized persons (R. Exh. 4, p. 15). During the conversation in Tallaksen's office on October 2, 1990, between Jones and the Company's officials Wieranga and Tallaksen, Jones admitted that he had his son in his truck and that he had done so for almost 4 years (Tr. 569, 837). Tallaksen informed Jones that he was terminated and ordered him to clear out his truck (Tr. 569, 836). The Company issued two documents, one an incident warning notice, dated October 2, 1990, and another form signed October 4, 1990, showing that Jones was discharged (G.C. Exhs. 16, 17).

I find Jones' testimony that he had transported his son in his company vehicle on prior occasions and that the Respondent had been aware of it for approximately 4 years entirely credible and plausible. Indeed, the practice may still not be contrary to the Respondent's policy manual or the Federal Safety Regulation. As argued by the General Counsel, Jones was "off duty" when he took his tractor home for cleaning. He was certainly not making a delivery and being dispatched in the regular course of business. Significantly, none of the other drivers when asked about the Respondent's rider policy knew about it or were familiar with such a policy (Tr. 1455, 1499, 1517, 1532). The Respondent's reliance on the subsequent discharge of a probationary employee on November 20, 1990, for transporting an unauthorized passenger while making an *official* delivery is not comparable and is certainly not an indication of an even-handed policy (G.C. Exh. 8). The sudden application of the policy appears to be discriminatory. The timing of Jones' discharge, ap-

<sup>9</sup>Drescher, as a current employee, had nothing to gain by his testimony adverse to his employer's interest. Moreover, his forthright demeanor as a witness rendered his testimony entirely credible.

proximately 2 weeks after the union meeting at his home, the Company's knowledge of his union activity, and Tamminga's adverse comments about Jones, lead to the obvious inference, the Respondent used the rider incident in a disingenuous attempt to rid itself of a union supporter. In the absence of Jones' union activity, the Respondent would not have discharged this employee. I also find that the Respondent's interrogation of Drescher under clearly coercive circumstances amounted to a violation of Section 8(a)(1) of the Act.

*The Discharge of Herman William Rosenberg.* Conceding that Carry knew the union activity of Herman Rosenberg and Edward Peralta, it is the Respondent's position that it "went to great lengths to ensure that they were disciplined similarly to all other drivers" particularly since the Company anticipated charges of unfair labor practices (R. Br. p. 64-65). The General Counsel and the Charging Party submit that the Company's reason for Rosenberg's discharge was pretextual in nature and discriminatory. Employed as a truckdriver since April 1983, Rosenberg was at first a road driver and became a city driver at the Bridgeview terminal. He was discharged on February 28, 1991, for being "3 times late in a six-month period" (G.C. Exhs. 3k, m). The record shows that Rosenberg was late for work on July 27, 1991, and on October 30, 1991 (G.C. Exhs. 3d, f, g). Rosenberg was warned on November 5, 1990, that with another tardiness "he would get 3 days off or terminated" (G.C. Exh. 3f; Tr. 89). Carry's employee manual does not provide for a mandatory termination for what it terms "incurring excessive absences or lateness," but states that "behavior which cannot be tolerated . . . may lead to corrective action up to and including discharge" (G.C. Exh. 26). In any case, Rosenberg's third incident of lateness on December 28, 1990, resulted in his discharge under the following circumstances. Rosenberg was scheduled to depart the Bridgeview terminal at 3 a.m. on February 28, 1991. At 3:30 a.m., dispatcher Van Bruggen, who had noticed that Rosenberg had not made his dispatch time, called Rosenberg's home and left a message to wake him up (Tr. 855). Rosenberg called the dispatch office about 5 minutes later and informed dispatcher Lance White that he was sick and unable to report for work. About 4 p.m., Rosenberg called again to inform the dispatch office that he could not work on the following day. He also spoke to Tallaksen who accused him of being late and expressed doubt about Rosenberg's reported illness (Tr. 92, 856). On the following day, March 1, 1991, Tallaksen called Rosenberg and recalled the following conversation (Tr. 857-858):

I asked Bill how he was feeling. He said he was feeling a little better. I asked him if he could come in and talk to me. He stated that no, he didn't feel that good. I then asked him what happened, why he didn't come into work. He told me that on his way to work on 294 he had gotten sick, soiled his britches and turned around on 95th Street and went back home. I asked him why he didn't call in. He then stated that he couldn't find a phone. I told him there were phones right there at the 159th Street toll plaza. He said that he didn't want to offend anybody. . . . He also asked me if he needed a doctor's excuse and I said no, that you didn't need one. I said if you pay the money they will give you a release, and he said yes, he knew that.

At that point I terminated him. . . . That I was terminating him for three lates in a six-month period.

Rosenberg testified that he had a legitimate excuse for his failure to report to work and that he was not late. His version of the events is that he was on his way to work about 2:20 a.m. on February 28, when he suddenly became ill with diarrhea and had to return home to clean himself. During that time the dispatcher called and spoke to his daughter who, unaware that her father had actually left for work, erroneously told the caller that her father was still asleep (Tr. 90, 127-128). Rosenberg obtained a doctor's excuse on the next day, March 1, 1991, and offered to show it to the Respondent (G.C. Exhs. 7, 8). As Tallaksen testified he had already determined that Rosenberg was late.

The written report prepared by the dispatcher reflects the following scenario (G.C. Exh. 3k):

Bill had a 3 A.M. start. I called Bill's house at 3:30 A.M. When a lady answered the phone, I asked if Bill was still there, she said he was still sleeping. I asked her to wake him up because he was late. She said she would. I hung the phone up, 3:34 the phone rang and Lance White answered it, Bill Rosenberg said he was calling in Sick.

The record fully supports a finding that the Respondent waited for just such an incident as a pretext to rid itself of the principal union activist. As aptly observed by the Charging Party, "Rosenberg's claim to be ill the morning of February 28, raised under the circumstances, valid grounds for suspicion," but the Respondent did not follow its usual and past practice in situations when an employee calls the office to report that he is sick and unable to report for work (G.C. Br. p. 19). Tallaksen testified that he did not believe Rosenberg's claim of illness but he also did not accuse him of falsifying his reason for being late. Under these circumstances, his usual practice is to require the employees to produce a doctor's release before they return to work (Tr. 1095). Tallaksen did not follow this practice in Rosenberg's case and, instead, presumed that Rosenberg would simply obtain a physician's release by paying the fee (Tr. 1096). The Respondent also deviated from its regular practice by treating Rosenberg's tardiness more severely than that of other employees. First, the employees' manual does not reflect the Respondent's alleged policy requiring discharge after three instances of lateness within 6 months (G.C. Exh. 26). The handbook cites excessive absence or lateness which "may lead to corrective action up to and including discharge" and the progressive discipline outlined under "corrective action" may be applied by the Company in its discretion. Indeed, Tallaksen conceded that a lot of times he did not hold an employee to "the three times" rule and that he failed to inform the employees of the new policy (Tr. 851, 948). Several drivers testified that they never heard of the policy (Tr. 1480, 1510, 1537). And the only examples among the employees, John Rose and William Blake, who were disciplined according to the policy, involved different circumstances (G.C. Exhs. 9, 10). Blake had committed other offenses in addition to tardiness and Rose was a probationary employee (Tr. 862-863, 1105-1106). On the other hand, Scot DeBoer, a driver who had been late at least five times, was not discharged (Tr. 749-750, 757-758). The record I shows that this employee

was merely disciplined for being late twice in 1990 and for two incidents of tardiness in 1991 (R. Exh. 12). In any case, the record shows that Rosenberg's performance and conduct was treated differently than that of other drivers.

The reason for the disparate treatment is clear. As shown by the testimony of Valerie Albright,<sup>10</sup> Tallaksen was "going to definitely find a way to terminate Bill Rosenberg . . . but it would have to be something legitimate" (Tr. 748). Rosenberg was the main union activist who initially contacted the Union, scheduled a union meeting, distributed union authorization cards, and enlisted the assistance of other drivers to assist him. Rosenberg and Peralta appeared at the representation hearing in August 1990 and were known by the Respondent as the principal union advocates (R. Br. p. 64).

As early as July 1990, Hoving suspected that Rosenberg was engaged in union activities. Hoving called Rosenberg into his office and asked whether Rosenberg was involved in union activity. Rosenberg recalled the conversation as follows (Tr. 68-69):

When I walked into his office, he asked me if I was involved in union activity. At which time, I stated that I was not. Basically due to fear of losing my job. He then proceeded to tell me if the union was to get into Carry Transit that it would be the down fall of the company.

Hoving also asked him if he passed out union cards.

Hoving's recollection of the conversation differs from this version. According to Hoving, Rosenberg came to his office and said that he was not the one behind "all this Union stuff." When Hoving inquired why Rosenberg came to tell him that, Rosenberg said that other drivers may have erroneously informed him that he, Rosenberg, was pushing the Union. Although Hoving admitted stating that a union would not be in the Company's interest, I find Hoving's version less plausible and not credible (Tr. 1137-1138). I seriously doubt that Rosenberg would initiate a conversation with Hoving to deny his union involvement. Accordingly, I conclude that the circumstances of Rosenberg's interrogation suggest a coercive and intimidating atmosphere, where a senior management official summoned the employee into his office and blatantly inquired into his union activity. Such conduct violates Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

Another significant conversation occurred on August 31, when Rosenberg returned from a trip to Milwaukee. At the behest of Hoving, Rosenberg reported to Tallaksen's office where Tallaksen said that he had the proof he was looking for, namely, that Rosenberg was passing out union cards. When Rosenberg professed ignorance, Tallaksen said, "if it was ever reported to him again that [Rosenberg] was passing out union cards or talking union on company time that [he] could be immediately terminated" (Tr. 71-72). Tallaksen repeated the threat more emphatically and added "consider yourself warned, if it happens again you will be terminated" (Tr. 73, 873). Rosenberg had received a written warning, dated August 31, 1990, for soliciting on company time (G.C. Exh. 3(e)). The Carry employee manual contains a provision

prohibiting solicitation during "working time" and distinguishes between an employee's own time and the time an employee is working (G.C. Exh. 26). Although the rule in the manual is presumptively valid, it is not the same prohibition which Tallaksen told Rosenberg. Both Rosenberg's testimony and the Carry Transit incident warning notice prohibit solicitation on "company time." Such a prohibition could encompass both working and nonworking time on company property. Accordingly, such a rule is overly broad and unlawful. *Our Way*, 208 NLRB 394 (1983); *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987). The Company's threat to discharge an employee for a violation of such a rule is also unlawful, particularly under the circumstances here, where the Company professes to apply a progressive discipline policy. Yet the threat implies that a violation following the warning would result in an immediate discharge.<sup>11</sup>

Rosenberg's discharge following threats of discharge and interrogations as well as Tallaksen's threats to terminate the leading union activist support a finding that the reason for Rosenberg's discharge was pretextual and discriminatory. In the absence of his union activity, Rosenberg would not have been discharged. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 1989 (1982). I accordingly find that the Respondent violated Section 8(a)(3) and (1) of the Act.

*The Discharge of Edward Peralta.* Peralta, another leading union activist, lost much of his overtime work, was warned, was suspended for 3 days, and was finally discharged. Employed since December 18, 1989, as a road driver for Carry Transit, Peralta was discharged on April 30, 1991 (Tr. 195). Peralta became interested in the Union in July 1990. He passed out union authorization cards in various terminals within the 500-mile radius of Carry Transit. While Rosenberg campaigned among the city drivers, Peralta's efforts included all road drivers. He also attended the petition hearing on August 28 and 29, 1990, as a witness for the employees. On the day prior to the hearing, Peralta informed Tamminga that he was subpoenaed for the hearing. Later that day Tallaksen and Peralta had a conversation which, according to Peralta, was as follows (Tr. 202):

When I entered my office, he told me to sit down that he wanted to talk to me. The questions that he asked me, he says how did I get the subpoena. And then he says who issued the subpoena to me, why was I issued the subpoena, and if I was aware that he was the disciplinarian or enforcer for Carry Transit, that he wants to know who the ring leaders were for the Union. I told him I had no idea who the ring leaders were for the Union.

And then he said at that particular time that if I was a part of the Union, and I told him right then and there no. He says, "Are you sure, Eddie?" I says, "Mike, make sure that you know I am part." [sic] And he says, "I am telling you one thing, Eddie, if I find out who the ring leaders are, heads are going to roll."

<sup>10</sup> Albright's testimony was candid and appeared honest and plausible. She impressed me as an honest witness.

<sup>11</sup> On the basis of relevancy, I have omitted an episode about 1 month prior to the election when Rosenberg received a written warning for spitting into the back of a van (G.C. Exh. 3(b)). Rosenberg claimed that he merely spat gum on the ground (Tr. 75-79).

Following the hearing, Peralta returned to work and noticed that his belongings in his tractor had been disturbed and the inside of the cab ransacked. When he reported the matter to Tamminga and Hoekstra, they laughed and commented that it may have been another union driver (Tr. 204).

On August 31, 1990, Peralta approached Hoekstra and inquired about his work assignment for the following Saturday and Sunday, reminding him that he usually works every Saturday and as often on Sundays as possible. Hoekstra replied that his weekend assignment would cease, that he would no longer be permitted overtime work, and that he did not exist any more in the eyes of Tom Wieranga or Howard Hoving (Tr. 206). Tallaksen had instructed the dispatch office already in June 1990 not to permit Peralta to work 7 days a week (Tr. 880; R. Exh. 13). In early September 1990, Peralta also talked to dispatcher Ron Oldenberg about driving the Sunday shuttle. Oldenberg replied that he received instructions from management that he could not work on weekends. Peralta approached Hoving on the evening of the same day about the overtime assignments and the remark that he did not exist anymore. Hoving smiled and said that he considered the issue closed and did not care to discuss the matter any longer. The record shows that Peralta's overtime work decreased, although he continued to work on some weekends (Tr. 222; R. Exh. 10). Peralta also noticed that his name was occasionally removed or "whited out" from a list of volunteers for a weekend work list. Hoekstra, whom Peralta confronted for an explanation, professed ignorance (Tr. 216-217).

On October 4, 1990, Peralta had a conversation about his overtime work with Tallaksen in his office. Tallaksen initially mentioned a subpoena from the NLRB and asked Peralta what he knew about it. Peralta said that he knew nothing about it. Tallaksen then told Peralta to "keep his nose clean, stay straight, keep a low profile" and promised Peralta to intercede with management to restore the Sunday and overtime work. Tallaksen said: "In fact, watch your ass. They are after you and they want you" (Tr. 224-225). Tallaksen, referring to the recent hiring of 16 new employees, also said that the Company will squash the problem with the Union and the Labor Board if it takes 20 or more employees (Tr. 225).

Peralta and Rosenberg were scheduled to serve as union observers during the union election on November 8, 9, and 10, 1990. Yet on November 5, 1990, he was dispatched by orders of Hoekstra to make a delivery to California. Peralta promptly informed the dispatcher, Lance White, that he would be unable to comply with the dispatch orders (Tr. 228-229). White, claiming that he did not know about Peralta's union obligation, nevertheless prepared a Carry Transit incident report, dated November 5, 1990, critical of Peralta's failure to comply with the dispatch (G.C. Exh. 11; Tr. 1398).

On November 10, 1990, Peralta asked Tamminga, who was in charge of the dispatch office on that Saturday morning, if he could be dispatched early on Monday because he had to take care of a personal matter. Tamminga became angry and in obscene language told Peralta that he was tired of the union mess and that, "when this union mess is done, you are done[, t]ake the day off and get the hell out of here" (Tr. 239).

On Tuesday, following the election, Peralta went to work and discovered several incident warning notices in his mailbox (G.C. Exhs. 10(a), (b), (c)). These warnings criticized Peralta's inability to be available for work because of his function in the union election and the request for an early dispatch on Monday.

On December 5, 1990, Peralta received another incident warning notice relating to an incident on December 3, 1990. Peralta was cited for a "late 4 a.m. starting time." (G.C. Exh. 10(d).) His dispatch orders called for a 5 a.m. pickup at American Maize in Hammond, Indiana, with a 4 a.m. starting time. Peralta testified that he was at the terminal at 3:30 a.m., completed the usual preparations for his trip, and, shortly after leaving the terminal, backed up his truck because he had neglected to turn in his papers from the previous day. He went to the dispatch office where dispatcher Van Bruggen told him that he was late. Peralta expressed disagreement, handed in his papers, and left for his scheduled trip. He arrived on time at American Maize. The Company suspended him for 3 days citing two prior incidents of tardiness. Yet, according to company policy, a road driver is not considered late if he is on time for his delivery or pickup at the destination.

Peralta was finally discharged on April 30, 1991, under unusual circumstances. Peralta had been warned by Tallaksen during the October 4, 1990 meeting that Peralta would no longer be permitted to take his truck home (Tr. 349-350). On April 29, 1991, Peralta and several other drivers, including Gus Iannotti, had returned to the Bridgeview terminal from their respective deliveries about 12 or 1 p.m. when Hoekstra instructed Iannotti and Peralta to have their driving units stay hooked up because they were going to be dispatched to a customer in Battle Creek, Michigan (Tr. 261-262). Peralta was told to deliver the load at 6 a.m. local time or 7 a.m. in Battle Creek. Peralta, reminding Hoekstra that his home, located in Lake Station, Indiana, is en route to Michigan, asked whether he could "head home and leave from the house" (Tr. 202). Hoekstra replied, "Eddie I don't care what you do, just get out of here" (Tr. 262). Peralta assumed that he had been given permission, noted on his dispatch sheet, "Lake Station, as per dispatch okayed Dave Hoekstra" and punched the timeclock (G.C. Exh. 12).

Iannotti testified that he overheard Peralta talking for some time to Hoekstra and that Hoekstra said something like "I don't care how you do it." Iannotti also witnessed Peralta making notations on his dispatch sheet and stamping or punching it because he considered it unusual for a driver to take such extensive precautions (Tr. 418).

Peralta left the Bridgeview terminal in the afternoon of April 29, 1991, and parked his trailer at the Petro Truck Stop near his home in Lake Station (Tr. 267). He secured the trailer with the usual precautions by locking it with a pin lock, putting legs down, and putting padlocks on the hatch and on the unloading doors (Tr. 268-269). He drove home in the tractor and returned about 2 a.m. on April 30, 1991. He made the delivery in Battle Creek about 4:30 or 5 a.m. From there he returned to the Bridgeview terminal about 12 or 12:30 because he had received urgent instructions to see Tallaksen. Tallaksen immediately demanded to see Peralta's logbook and expressed surprise on seeing that Peralta had obtained permission: "Why, I will be a son of a bitch. I Somebody is lying to me" (Tr. 277). Tallaksen called

Hoekstra to his office telling him, Peralta "has got his ass covered because . . . [h]e got permission to be in Lake Station" (Tr. 276). During the meeting in Tallaksen's office, which included Hoekstra and Tamminga, Hoelskstra denied giving Peralta permission to park his trailer near his home.<sup>12</sup> Tamminga interrupted the dispute and sided with Hoekstra and said to Peralta: "When his whole mess is over, you are going to be gone" (Tr. 277). Tallaksen left the office momentarily to make copies of Peralta's papers, then informed him: "As far as I am concerned I am going to have to terminate you . . . and the reasons are for unlawful use of a vehicle," (Tr. 281) or "for unauthorized use of company equipment, dropping a loaded food grade trailer in a truck top" (Tr. 281, 929-930). The Company issued incident warning notices which reflect the same reason (G.C. Exh. 10i, j). Tamminga added, "we got so many charges on you Eddie. We could get you for falsifying a log, unlawful use of a vehicle, for being late for accidents." (Tr. 281.) Peralta replied, "Also for being a part of organizing a union or being part of a union" (Tr. 281). Peralta left the meeting to get his personal belongings out of his truck. On his way he informed Tom Kampen, a coworker, that he had just been discharged. Peralta returned to Tallaksen's office where Tom Kampen overheard the ensuing conversation. According to Kampen's and Peralta's testimony, Tallaksen said that he knew that Hoekstra was lying to him and that Peralta would be back if he could prove to him that Hoekstra was wrong (Tr. 284-285, 430-433).

The record shows that the Company's reason for Peralta's discharge was discriminatory. Initially, it is clear—Hoekstra's denial notwithstanding—that Peralta had obtained specific permission. The dispatch notice and Iannotti's testimony clearly corroborate Peralta's testimony. Moreover, the parking of a trailer at a convenient location was a common practice for other drivers. Kampen testified that many drivers follow the practice, at least six or seven city drivers and numerous road drivers, and that he considered it a common practice (Tr. 433). Iannotti testified that he had obtained permission to park his trailer and thought it was the usual practice for other drivers (Tr. 412-413). Dean Jones never heard any dispatcher prohibit such a practice (Tr. 1509). Indeed, the Respondent had prepared a list of drivers showing that certain drivers had permission to "drop their trailers" near their homes so long as there was a safe place to park (Tr. 1197; R. Exh. 22). The Petro Truck Stop, which is guarded by a security guard and which is enclosed, was by all standards a secure, safe, and appropriate area in which to park a loaded trailer (Tr. 1244). Considering the Respondent's threats to discharge ringleaders of the Union, the Respondent's admitted knowledge of Peralta as a leading union activist, the repeated references to Peralta that management was out to get him, as well as Albright's pointed testimony that management was searching for a legitimate way to terminate Peralta because of his union role, conclusively establish that the Respondent violated Section 8(a)(1) and (3) of the Act.

<sup>12</sup>Hoekstra denied giving Peralta permission to drop his trailer at the Petro Truck Stop but testified that he had given permission "to sleep out with the load en route to the client, as his truck was equipped with a sleeper berth" (Tr. 1350-1351, 928-929). I find Peralta's version of the events more specific and credible.

The Respondent's interrogation of Peralta in late August to reveal the union ringleaders and the threat to discharge them once their identity is established clearly violate Section 8(a)(1) of the Act. The interrogation accompanied by a threat is by all accounts coercive and therefore meets the test in *Rossmore House*, supra. The Respondent's statements to quash the problem regarding the Union and the Labor Board as well as the statement that "Peralta was done" when the union mess is over are clearly coercive and interfere with the employees' Section 7 rights and, accordingly, violate Section 8(a)(1) of the Act. The Respondent's threat to hire additional employees to defeat the Union and the promise to restore overtime work if the employee refrained from union activity are clear violations of Section 8(a)(1) of the Act. I also regard the warnings to Peralta and the 3-day suspension for tardiness in December to be discriminatory. Peralta was only arguably late in his starting time, but he made the delivery on time which, under the Respondent's own policy, is not considered late.

Insofar as the complaint deals with Peralta's overtime and weekend work is concerned, I find the record to be inconclusive. Without a doubt, Peralta lost a significant amount of overtime pay and an inference is possible that it was union related, but the record also shows that Tallaksen ordered reductions in Peralta's overtime and his 7-day workweek already in June 1990 (R. Exh. 13, Tr. 880). This reduction in overtime was effectuated prior to Peralta's union involvement which, according to his own testimony, began in July 1990 (Tr. 96). Peralta's reduced overtime was a direct result of the Respondent's action taken in June 1990. To what extent his overtime was reduced if at all is a result of his union activity is unclear. The record shows, for example, that Peralta continued to work on weekends, albeit at a reduced level during the period following the union representation hearing (R. Exh. 14). He was no longer assigned to the Sunday shuttle to assure his availability for work early on Monday mornings. The record shows that other drivers with similar seniority worked on a reduced schedule at a reduced level of income (G.C. Exhs. 23, 24, 25). For example, Gregory Cook suffered a similar reduction in warnings. The General Counsel concedes this, but argues that the days in Peralta's pay were more precipitous. I find that the record supports a finding that Tallaksen made promises and threats relating to this issue, but the record does not establish that any reduction in his income was directly attributable to his union activity. I would therefore dismiss this allegation in the complaint.

#### Other Violations

In addition to the Company's conduct violative of Section 8(a)(1) and (3) of the Act as it related to certain drivers, the Respondent violated the Act in certain other ways.

On September 23, 1990, the Union's business representatives, Richard Mall and Jack Slattery, distributed union literature at the Bridgeview terminal for about 7 hours from 12 midnight to 7:15 a.m. They stood near the west entrance which is the normal truck gate and passed out approximately 80 leaflets to the drivers as they entered the facility. About 4 or 4:15 a.m., Tallaksen approached the two men and asked what they were doing. After the union representatives identified themselves, Tallaksen remained in their presence within 2 to 3 feet of them until 7:15 a.m. Mall asked Tallaksen to

leave the area because he seemed to intimidate the drivers. Approximately 2 weeks later, Mall and another union agent repeated their efforts to pass out union leaflets from 12 midnight until about 6 a.m. Tallaksen, accompanied by an off-duty policeman, approached the union men and warned them not to cross an imaginary yellow line separating the public property from the Company's easement or risk being arrested. Tallaksen and the policeman then sat in a company car parked within the Company's entrance. Mall complied with these warnings and did not cross the line. As a consequence of the imaginary line, they stood closer to the street. Mall testified that it was unsafe to pass literature to the drivers under such circumstances (Tr. 772-779).<sup>13</sup>

Although an employer's mere observation of open and public union activity does not amount to unlawful surveillance, it is another matter when the employer does so for the entire duration of the union activity and in such close proximity that it well nigh interferes with the lawful activity and in such a conspicuous manner, as here. *Impact Industries*, 285 NLRB 5 (1987). As alleged in the complaint, I find the Respondent's conduct to violate Section 8(a)(1) of the Act.

The complaint also alleges that letters written to the employees by George Van Denend, the Respondent's president, violated the Act because they threatened employees with a refusal to grant pay raises and the loss of their employment. The first letter, dated February 28, 1991, informs the employees about the Board's decision dealing with the voting unit and about the scheduling of the instant unfair labor practice hearing. In other pertinent parts, the letter states as follows (G.C. Exh. 5):

What does this mean to us as employees of Carry? The wages and benefits of the drivers and mechanics based in Bridgeview, who the NLRB determined to be an appropriate unit, cannot be changed until this matter is resolved by the Administrative Law Judge, which could be 3 to 12 months.

The second letter, dated March 29, 1991, also deals with the unfair labor practice hearing and the filing of an election petition. Of significance are the following two paragraphs (G.C. Exh. 6):

Although this is all very confusing, there is one thing that is very clear—we do know that today it is getting tougher and tougher to get customers and to retain business so that we can continue to employ approximately 331 employees. It's even tougher when the Union keeps filing petitions and unfair labor practices. These matters take a lot of time and effort for us to defend. The Union is certainly not helping the job security of Carry employees by taking our attention away from trying to run a business. If this is an indication of the type of turmoil and controversy that we'd experience with a union, we certainly don't want any part of it. Not only is it bad for business, but in turn, it's not in the best interests of the many households that depend on Carry running a successful business.

Because several questions arose out of our February 28th letter pertaining to this point, I want to make one

point very clear—that is, the Company *can and will* continue with any wage progression plan and pattern of merit reviews that *were in effect prior to the filing of the election petition. The thing the Company cannot do* is to unilaterally establish any unplanned wage or fringe benefit program during the period between the filing of an election petition and certification of the election results. While this may be unfortunate, we must abide by the law!

It is true that the first letter does not accurately reflect the company's obligation during a union campaign. The withholding of a planned pay raise which would ordinarily be granted in the normal course of business as if the Union had not been on the scene violates Section 8(a)(1) of the Act. Here, the letter blames the administrative hearing rather than the union campaign for the withholding of any pay raises for the duration of 3 to 12 months. The letter does not reflect the Company's implementation of a wage freeze but warns the employees of those possibilities. Van Denend's letter 1 month later attempts to correct this message by stating that the Company will and can continue to effectuate any planned pay raises and that it cannot unilaterally establish an unplanned wage increase or fringe benefit program. Although the General Counsel observed that the initial statement is an unlawful attempt to coerce the employees in the exercise of their Section 7 rights, I would dismiss this allegation in view of the Company's second letter correcting the prior statement.

The Respondent's statements in the second letter referring to the Union "not helping the job security of Carry employees" and the Union's creation of turmoil and controversy which is not only "bad for business, but in turn, it is not in the best interest of the many households that depend on Carry running a successful business" could be perceived as a veiled threat that the employees could lose their jobs because of the petitions and the unfair labor practice charges filed by the Union. I agree that the language tends to coerce the employees in their Section 7 rights in violation of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, Carry Companies of Illinois, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 705, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about union meetings or union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with discharge, loss of employment, or the loss of overtime work because of their union activities, the Respondent violated Section 8(a)(1) of the Act.

5. By promulgating an overly broad no-solicitation rule forbidding union solicitation on company time, the Respondent violated Section 8(a)(1) of the Act.

6. By intimidating employees and interfering with their protected rights, the Respondent violated Section 8(a)(1) of the Act.

<sup>13</sup> The second incident was closely related and was fully litigated.

7. By engaging in surveillance of employees' union activity, the Respondent violated Section 8(a)(1) of the Act.

8. By threatening to hire additional employees in order to defeat the Union and by promising employees to restore overtime work if they refrained from their union activity, the Respondent violated Section 8(a)(1) of the Act.

9. By warning and suspending Herman William Rosenberg and Edward Peralta and by discharging them and Dean Ridder and Dean Jones because of their union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully warned and suspended Herman William Rosenberg and Edward Peralta and having discharged Dean Ridder, Dean Jones, Herman William Rosenberg, and Edward Peralta, the Respondent shall offer them reinstatement and make them whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]